

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| In the Matter of |) | |
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| Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band |) | PS Docket No. 06-229 |
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| Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010 |) | WT Docket No. 96-86 |
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| |) | |
| City of Phoenix, Arizona Request for Waiver |) | |

ORDER

Adopted: November 14, 2008

Released: November 14, 2008

By the Chief, Public Safety and Homeland Security Bureau:

I. INTRODUCTION

1. On July 31, 2007, the Commission adopted a *Second Report and Order* revising the rules governing the 700 MHz band.¹ In the *Second Report and Order*, the Commission redesignated ten megahertz of public safety 700 MHz spectrum (763-768/793-798 MHz) for the purpose of establishing a nationwide, interoperable broadband public safety communications network. In order to accommodate this broadband allocation, the Commission consolidated the public safety narrowband channels so that they are located at 769-775/799-805 MHz.² Subject to certain conditions and limitations, the Commission determined that the Upper 700 MHz Band D Block licensee will pay the costs associated with relocating public safety narrowband operations to the consolidated channels.³ To facilitate the relocation process, and clearly define the costs that would be entitled to reimbursement, the Commission required every 700 MHz band public safety licensee, whether holding individual narrowband authorizations or operating pursuant to a State License, to certify the number of narrowband mobile and portable handsets, and base stations serving these handsets, in operation as of August 30, 2007 (30 days following adoption of the *Second Report and Order*).⁴ The Commission also prohibited authorization, whether pursuant to individual license or State License, of any new narrowband operations outside of the consolidated channels as of August 30, 2007, and cautioned that any equipment deployed outside of the consolidated channels after August 30, 2007 would be ineligible for relocation funding.⁵

¹ Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, PS Docket No. 06-229, WT Docket No. 96-86, *Second Report and Order*, 22 FCC Rcd 15289 (2007) (*Second Report and Order*).

² *Id.* at 15409 ¶ 329.

³ *Id.* at 15411 ¶ 336.

⁴ *Id.* at 15411 ¶¶ 336-337.

⁵ *Id.* at 15412 ¶ 339.

2. On October 17, 2007, the City of Phoenix, Arizona (Phoenix) requested waiver relief concerning narrowband operations outside of the consolidated channels in support of its 700 MHz system, the Phoenix Regional Wireless Network (PRWN).⁶ Specifically, Phoenix requests waiver of the following provisions of the *Second Report and Order*: (1) the prohibition on authorization of new narrowband operations outside the consolidated channels after August 30, 2007; and (2) the limitation on cost reimbursement to equipment that was in operation as of August 30, 2007, to allow Phoenix to include as eligible for relocation funding all handsets and vehicle-mounted repeaters which it expects to deploy after August 30, 2007. In addition, Phoenix requests that it be allowed to perform its 700 MHz and 800 MHz re-banding together by the earlier of January 31, 2009, the 700 MHz relocation date established by the Public Safety Broadband Licensee in conjunction with the D Block Licensee, or the earlier of any 800 MHz re-banding requirements. For the reasons discussed below, we grant the Waiver Request in part on a limited basis, and defer action on the Waiver Request in all other aspects.

II. DISCUSSION

3. As an initial matter, several parties have filed petitions for reconsideration of provisions of the *Second Report and Order*, including the prohibition on authorization of new narrowband operations outside of the consolidated channels following August 30, 2007, and the limitation on cost reimbursement for equipment that was in operation as of August 30, 2007.⁷ In addition, on May 14, 2008, the Commission issued a *Second Further Notice of Proposed Rulemaking*, which sought comment on, among other issues, narrowband relocation, including the petitions for reconsideration of the *Second Report and Order*.⁸ As a follow-up to this *Second Further Notice*, the Commission issued a *Third Further Notice of Proposed Rulemaking* on September 25, 2008, which sought comment on tentative conclusions and proposed rules concerning various 700 MHz public safety spectrum issues, including narrowband relocation.⁹ In the interests of public safety, we provide Phoenix limited waiver relief of the prohibition on new narrowband operations outside of the consolidated channels after August 30, 2007. As further explained below, the Commission will determine the duration of such relief, and whether Phoenix is entitled to reimbursement for relocation of equipment installed after August 30, 2007, after fully considering the petitions and associated public record submitted in response to both the *Second Further Notice* and *Third Further Notice*.

4. Section 1.925 states that to obtain a waiver of the Commission's rules, a petitioner must demonstrate either that: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the present case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest,¹⁰ or the applicant has no reasonable alternative.¹¹ An applicant seeking a waiver faces a high hurdle and must

⁶ Request for Waiver of Commission Rules, filed by City of Phoenix, Arizona, PS Docket No. 06-229 (filed Oct. 17, 2007) (Waiver Request).

⁷ See, e.g., Commonwealth of Virginia, Virginia State Police, Petition for Reconsideration, PS Docket No. 06-229, WT Docket No. 96-86 (filed Sept. 24, 2007).

⁸ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Second Further Notice of Proposed Rulemaking*, 22 FCC Rcd 8047 (2008) (*Second Further Notice*).

⁹ See Service Rules for the 698-746, 747-762 and 777-792 MHz Bands; Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band, WT Docket No. 06-150, PS Docket No. 06-229, *Third Further Notice of Proposed Rulemaking*, FCC 08-230 (rel. Sept. 25, 2008) (*Third Further Notice*).

¹⁰ 47 C.F.R. § 1.925(b)(3)(i).

¹¹ 47 C.F.R. § 1.925(b)(3)(ii).

plead with particularity the facts and circumstances that warrant a waiver.¹²

5. On November 14, 2007, the Commission adopted and released an Order that granted the Commonwealth of Virginia, Virginia State Police (Virginia) limited interim waiver relief to enable Virginia to continue to deploy new narrowband operations outside of the consolidated narrowband channels.¹³ In this Order, the Commission found that it is in the public interest to “provide interim waiver relief for continued deployment outside of the consolidated narrowband channels where there has been a showing of potential public harm and there is evidence of a comprehensive 700 MHz deployment plan that predates August 30, 2007 for which equipment has been received and/or deployed.”¹⁴ We next examine whether Phoenix satisfies these criteria.

6. In its Waiver Request, Phoenix makes a claim of potential public harm should it be unable to continue to deploy additional narrowband operations following August 30, 2007. Phoenix, which has been under contract since December 2003 with Motorola to purchase and deploy a 700 MHz system, states that it will deploy 509 portable and 335 mobile radios to support its PRWN Expansion and City of Tempe Transition Project after August 30, 2007, and is seeking to include them in the pool of equipment for which it is entitled to relocation reimbursement.¹⁵ Phoenix states that moving to the consolidated narrowband channels will “force City of Phoenix public safety personnel to operate on two disparate frequency sets.”¹⁶ In addition, Phoenix states that it is under agreement with neighboring jurisdictions to accommodate their use of 700 MHz frequencies outside of the consolidated narrowband frequency blocks.¹⁷ Phoenix asserts that without a waiver, certain groups of public safety users in the City of Phoenix will be unable to communicate with each other, with their regional partners and with outside agencies, and that equipment testing associated with fire scene tactical operations will be delayed.¹⁸ Phoenix requests that it be allowed to deploy 700 MHz equipment outside of the consolidated narrowband frequency blocks in order to enable compatibility between all equipment on the PRWN system until the 700 MHz plan has been defined and funded.¹⁹ Finally, Phoenix requests that it be allowed to perform its 700 MHz and 800 MHz re-banding together by the earlier of January 31, 2009, the 700 MHz relocation date established by the Public Safety Broadband Licensee in conjunction with the D

¹² See *WAIT Radio v. FCC*, 418 F.2d 1153, 1158-59 (D.C. Cir. 1969), *aff’d*, 459 F.2d 1203 (D.C. Cir. 1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹³ Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band; Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Communications Requirements Through the Year 2010, 22 FCC Rcd 20290 (2007) (*Virginia Order*).

¹⁴ *Id.* at 20293 ¶ 7.

¹⁵ Waiver Request at 1. Phoenix states that it is licensed to use three low power mobile-only 700 MHz frequencies for testing and evaluating eight digital vehicle repeaters for in-building radio coverage of tactical fire operations and anticipates that it will program approximately 2,000 additional radios from various local agencies on these frequencies after August 30, 2007, in order to support large regional events scheduled in the Phoenix area in early 2008. *Id.*

¹⁶ Waiver Request at 2.

¹⁷ According to Phoenix, it is under contract with Motorola to construct an additional Project 25 SmartZone simulcast zone for the PRWN that is part of the PRWN Expansion and City of Tempe (Tempe) Transition Project and slated to initiate service by July 2008. As part of this project, Tempe will deploy 50 handsets to be used by Tempe’s police department SWAT unit. Further, Phoenix states that Tempe will become a regional partner with Phoenix by joining PRWN and must be allowed to deploy its remaining 794 police radios on the SmartZone system using the same set of 700 MHz tactical simplex frequencies as its partner agency or interoperability between them will be compromised. Waiver Request at 2. To be clear, the waiver relief granted herein to the City of Phoenix, Arizona, does not extend or apply in any way to the City of Tempe or encompass any 700 MHz narrowband radios operated by the City of Tempe.

¹⁸ *Id.*

¹⁹ *Id.*

Block Licensee, or the earlier of any 800 MHz re-banding requirements.²⁰

7. We find that Phoenix has made a sufficient showing of “potential public harm,” based on its representation that its ability to respond to a public safety emergency would be compromised should it be unable to continue to deploy new narrowband operations outside of the consolidated narrowband channels. Phoenix also has provided documentation showing that its 700 MHz radio system design and its corresponding path for implementation have been in place since December 2003.²¹ Thus, we also find that Phoenix has provided sufficient “evidence of a comprehensive 700 MHz deployment plan that predates August 30, 2007, for which equipment has been received and/or deployed.” Having satisfied the criteria established by the Commission in the *Virginia Order*, we find it to be in the public interest to grant Phoenix limited interim waiver relief to deploy new narrowband operations outside the consolidated bands after August 30, 2007, until the Commission resolves the issues pending in the *Second Further Notice* and *Third Further Notice*. For the same reason, we defer ruling on the continued duration of this limited waiver relief, and whether Phoenix would be entitled to cost reimbursement for any new narrowband operations deployed after August 30, 2007, until the Commission rules on the outstanding petitions.

8. Our decision to permit Phoenix to continue to place new narrowband radios into operation after August 30, 2007 is without prejudice to the Commission’s subsequent ruling on these outstanding waiver issues – including whether Phoenix would be entitled to reimbursement for the costs associated with relocating any additional narrowband operations outside of the consolidated narrowband channels that Phoenix deploys after August 30, 2007. To the extent, however, that Phoenix is able to deploy in the consolidated bands and avoid the need for relocation, we encourage it to do so. Such deployment would eliminate any future disruptions to operations due to the need to relocate, and would reduce the overall cost of the relocation process.²²

III. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to sections 1, 4(i), 301, 303, and 332 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 301, 303, 332, and Section 1.925 of the Commission’s rules, 47 C.F.R. § 1.925, THIS ORDER in PS Docket No. 06-229 and WT Docket No. 96-86 is ADOPTED.

10. IT IS FURTHER ORDERED that the Waiver Request filed by City of Phoenix, Arizona, on October 17, 2007 is GRANTED IN PART to the extent discussed herein, and that action on the Waiver Request is DEFERRED IN ALL OTHER RESPECTS.

11. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission’s rules, 47 C.F.R. §§ 0.191, 0.392.

²⁰ *Id.* at 3.

²¹ *Id.* at 1-2.

²² To the extent that waiver of any Commission rules would be required to enable immediate deployment in the consolidated bands, such requests may be filed in accordance with the Commission’s waiver rules, 47 C.F.R. § 1.925. We also note that public safety entities in need of commencing operations in advance of Commission approval of a 700 MHz regional plan should file a request for Special Temporary Authority. *See* Public Safety and Homeland Security Bureau Reminds 700 MHz Regional Planning Committees of the January 31, 2008 Deadline to Amend 700 MHz Narrowband Plans and Provides Further Guidance, *Public Notice*, 22 FCC Rcd 21889, 21892 (PSHSB 2007).

FEDERAL COMMUNICATIONS COMMISSION

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